1991

Ronnie Lee Gardner v. Tamara Holden : Brief of Appellee

Utah Supreme Court

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BRIEF

IN THE UTAH SUPREME COURT

RONNIE LEE GARDNER, Petitioner-Appellee and Cross-Appellant, v. TAMARA HOLDEN, Warden of the Utah State Prison, State of Utah, Respondent-Appellant and Cross-Appellee.	)	Case No. 910500 Category 3

BRIEF OF PETITIONER-APPELLEE AND CROSS-APPELLANT

APPEAL AND CROSS-APPEAL FROM A DECISION GRANTING IN PART AND DENYING IN PART A PETITION FOR POSTCONVICTION RELIEF, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE RAYMOND S. UNO, PRESIDING.

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Ronnie Lee Gardner, Petitioner-Appellee and Cross-Appellant herein, was the petitioner in the district court and will be referred to by name or as the Petitioner. Respondent-Appellant and Cross-Appellee, the State of Utah, will be referred to as the prosecution or the State. In references to the record, "T." will refer to the transcript of Mr. Gardner's preliminary hearing and trial, and "H." will refer to the transcript of the evidentiary hearing conducted in the district court on November 27 and 28, 1990.

JURISDICTION AND NATURE OF PROCEEDINGS

The State appeals from a decision of the Salt Lake County District Court granting in part a Petition for Writ of Habeas Corpus and/or for Postconviction Relief filed by Ronnie Lee Gardner, and vacating his death sentence. The district court granted relief on the grounds that Mr. Gardner received ineffective

assistance at sentencing, due to counsel's failure to investigate and present mitigating evidence, and on direct appeal. Mr. Gardner cross-appeals from the district court's decision to deny his petition on other grounds. The Court has jurisdiction over this appeal under Utah Code Ann. § 78-2-2(3)(i).

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly conclude that trial counsel provided ineffective assistance, based on its findings of fact that they unreasonably waited until after the guilty verdict to seek mental health mitigating evidence, and never obtained psychological, neurological or medical testing or investigated the probability that Mr. Gardner suffered from organic brain damage?

2. Did the district court correctly determine that Mr. Gardner received ineffective assistance on direct appeal, under the following circumstances: appellate counsel did not raise important issues; the original appellate attorneys worked in the same public defender's office as trial counsel; the replacement appellate attorney represented a co-defendant in the case; the replacement attorney was not accurately informed of the scope of his representation; original appellate counsel continued to submit documents although they had been removed from the case because of conflicts; and original appellate counsel wrote briefs and petitions on the issue of ineffective assistance of the public defenders and submitted them to replacement counsel for filing?

3. When a court in postconviction review determines that a defendant under a death sentence received ineffective assistance of

appellate counsel for the reasons discussed above, must he be allowed an appeal with effective assistance from independent counsel?

4. Did trial counsel provide effective assistance in this capital case when, in addition to the grounds found by the district court: (1) they were witnesses at the scene of Mr. Gardner's arrest and their theory of defense depended on establishing their client's mental and physical states at that time, yet they continued to represent him in violation of the witness-advocate rule; (2) they had conflicts of interest due to their relationships with the State's witnesses and due to the development of animosity between them and their client; (3) they failed to ensure the preservation of an adequate record of the trial and related matters, including Mr. Gardner's requests that they withdraw; (4) they did not adequately investigate and present their theory of defense; (5) they failed to object to inadmissible hypnotically-enhanced testimony; (6) they unreasonably decided that Mr. Gardner should testify and exerted undue pressure to gain his acquiescence; (7) in their client's testimony, they introduced the fact that he had been convicted of numerous felonies, which were inadmissible under Utah Rule of Evidence 609; (8) they failed to object or to a request a bifurcated procedure to deal with the aggravating circumstance that Mr. Gardner "was previously convicted of . . . a felony involving the use or threat of violence to a person," under Utah Code Ann. § 76-5-202(1)(h); (9) they stipulated to the existence of an aggravating circumstance, without their client's

permission; (8) they never investigated the constitutional validity the prior convictions used against their client; (9) they did not challenge the use of an aggravating circumstance alleged by the State, although there was authority available to argue that it did not apply; and (10) they did not request personal voir dire, or request an opening statement in the penalty phase?

5. Should a conviction and death sentence be vacated when they are based on inherently unreliable, hypnotically-enhanced testimony from the State's central witness?

6. In a capital case, should the defendant receive an advisement from the court concerning his rights to testify or remain silent, and matters affecting the decision whether to take the stand? May trial counsel in a capital case coerce the defendant into testifying?

7. Was Mr. Gardner's right to presence violated when the trial court conducted hearings on motions in his absence?

8. Was the Utah Constitution's requirement of a reasoned and reliable capital sentencing proceeding violated when the State was allowed to disclose and argue evidence of the victim's good character, but Mr. Gardner was not permitted to present testimony in mitigation from the victim's friends and relatives that the victim would have wanted him to receive a life sentence?

9. Can the death penalty be constitutionally imposed when the trial court fails to instruct jurors on all applicable mitigating circumstances listed in Utah Code Ann. § 76-3-207(2)?

10. Should jurors in a capital case be instructed in

accordance with State v. Wood, 648 P.2d 71, 84 & n.10 cert. denied, 459 U.S. 988 (Utah 1982), that the State must establish the existence of any aggravating circumstances beyond a reasonable doubt?

11. Where a petitioner convicted of a capital crime and sentenced to death files a Petition for Writ of Habeas Corpus and/or for Postconviction Relief asserting that he received ineffective assistance of counsel at trial, does the postconviction court commit error and violate the United States and Utah constitutions in refusing to appoint expert witnesses and an investigator to assist him in preparing and presenting the case?

STANDARD OF REVIEW

The issues presented in Questions 1, 2, 3 and 4 are based on trial and appellate counsel's ineffective assistance. Issues of ineffective assistance of counsel are mixed questions of law and fact. Strickland v. Washington, 466 U.S. 668 (1984); State v. Templin, 805 P.2d 182, 186 (Utah 1990). The factual components of the question are reviewed under the "clearly erroneous" standard, requiring this court to grant great deference to the trial court's findings of fact. State v. Walker, 743 P.2d 191, 192 (Utah 1987). In addressing legal components, this Court applies the "correction of error" standard and is not required to view the trial court's rulings with deference. Templin, 805 P. 2d at 186.

The issues presented in Questions 5, 7, 8 and 9 also appear to be mixed questions of law and fact. The issues presented in Questions 6, 10 and 11 address questions of constitutional rights,

statutory interpretation or conclusions of law, and are reviewed under the "correction of error" standard. State v. James, 819 P. 2d 781, 796 P. 2d (Utah 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corollary provisions of the Utah Constitution, are relevant to this appeal. The Fifth Amendment provides in pertinent part that:

> [N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

The Sixth Amendment provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

The Eighth Amendment states that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment states in pertinent part that:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, § 7 of the Utah Constitution provides that:

> No person shall be deprived of life, liberty or property, without due process of law.

Article I, § 9 of the Utah Constitution provides that:

> Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor.

Article I, § 12 of the Utah Constitution states in pertinent part:

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall nay accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. . . .

Other constitutional and statutory provisions and court rules will be referred to as necessary in the text of this brief.

STATEMENT OF THE CASE

In October 1985, Mr. Gardner was tried by a Salt Lake County jury on charges of First Degree Murder, Attempted First Degree Murder, Aggravated Kidnapping, Escape and Possession of a Dangerous Weapon by an Incarcerated Person. On October 22, 1985, the jury found him guilty as charged, and in the penalty phase of trial, conducted on October 24 and 25, 1985, decided that he should be executed. The trial court's judgment sentencing Mr. Gardner to death was entered on October 25, 1985.[1]

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[1] On the non-capital offenses, Mr. Gardner received two terms of five years to life and two sentences of one to 15 years in the Utah State Prison, with each sentence to be served consecutively.

On January 31, 1989, this Court rejected the issues raised on direct appeal and affirmed Mr. Gardner's conviction and sentence. Gardner v. State, 789 P.2d 273 (Utah 1989), cert. denied, 494 U.S. 1090 (1990). Rehearing was denied on November 15, 1989. On April 16, 1990, the United States Supreme Court denied Mr. Gardner's Petition for Writ of Certiorari.

On June 29, 1990, the district court set an execution date of August 24, 1990. On the same date, undersigned counsel were appointed to represent Mr. Gardner on a volunteer basis, with the court ruling that they were not entitled to compensation for their work on his behalf. On July 16, 1990, Mr. Gardner filed his Petition for a Writ of Habeas Corpus and/or for Postconviction Relief. On August 8, 1990, the district court granted a stay of execution.

The Honorable Raymond S. Uno conducted an evidentiary hearing on November 27 and 28, 1990. After the submission of briefs from Mr. Gardner and the State, Judge Uno issued his decision on July 26, 1990. Judge Uno held that Mr. Gardner was entitled to a new sentencing hearing and to a new direct appeal because he had received ineffective assistance of counsel at those stages of the case. Relief on all other grounds was denied.

The State's Motion for New Trial was filed on August 5, 1991 and denied on October 7, 1991. The State's Notice of Appeal was filed on October 28, 1991, and Mr. Gardner's Notice of Cross-Appeal was timely filed thereafter.

STATEMENT OF THE FACTS

This case arose from a highly publicized incident at the Metropolitan Hall of Justice on April 2, 1985. On that morning, Mr. Gardner was brought from the Utah State Prison to attend a court hearing in a murder case, known as the "Cheers" case. Mr. Gardner was represented in that other case by Andrew Valdez and James Valdez, two brothers who worked as lawyers in the Salt Lake Legal Defenders Association.

As the prison guards brought him into the lobby in the basement of the courthouse, a woman appeared and handed a gun to Mr. Gardner. In an exchange of gunfire as the guards left the building, Mr. Gardner was shot in the chest, through his lung. In looking for an exit, Mr. Gardner entered a file room where attorney Michael Burdell was shot. After shooting a uniformed bailiff who confronted him, Mr. Gardner was led from the basement by a prison officer. He compelled a vending machine serviceman to walk with him outside the building, where he then collapsed on the lawn.

At the same time, Andrew Valdez and James Valdez were approaching the courthouse for the scheduled motions hearing. As Andrew Valdez was crossing the street to the courthouse:

> I looked across the street, I saw Ronnie in the plaza area of the Metropolitan Hall of Justice. He went down, I couldn't hear what was going on because the sirens were, there was all kinds of commotion. And he went down on the lawn, and I ran across the street and saw that he was bleeding from the chest area.

(H. 113). Andrew Valdez was told by a prison officer that Mr. Gardner had killed a lawyer, and his first thought was that his

brother, James, had been shot. (H. 114). Mr. Valdez went to Mr. Gardner on the courthouse lawn and asked him about James. In response, Mr. Gardner asked to be taken to a hospital. Andrew Valdez was removed from the scene by a detective, and was the first person Mr. Gardner recognized after collapsing on the lawn. (H. 74, 113-14).

James Valdez also observed Mr. Gardner at the scene of his arrest. As Mr. Valdez arrived at the courthouse in his car, he heard sirens and saw Mr. Gardner on the lawn. (H. 193-94). He immediately approached Mr. Gardner and asked about his brother, Andrew. Mr. Valdez was afraid that Andrew had been harmed, not necessarily by Mr. Gardner. (H. 194). Mr. Gardner said that he did not know where Andrew was. Mr. Valdez also testified that he inquired whether Mr. Gardner was okay, and Mr. Gardner said he was in some pain. (H. 194-95). Mr. Valdez then was ordered behind a barricade, but he continued to observe until Mr. Gardner was removed from the scene. (H. 196).

In the guilt phase of trial, counsel's theory of defense was that Mr. Gardner had not intended to kill Michael Burdell, and that the shooting was "essentially a reaction, a reaction after having been shot." (H. 131). Trial testimony from Robert Macri, a witness to the shooting as well as a friend and colleague of Mr. Burdell, was "devastating" to this defense. (H. 141). After the preliminary hearing and before trial, Mr. Macri was hypnotized at his request, in an attempt to remember more details about the incident.

Counsel did not withdraw despite the fact that they were witnesses to the effects of the shooting on Mr. Gardner. At the hearing conducted by the district court, Andrew Valdez testified that he did not believe his presence at the scene created a conflict. (H. 137-138). James Valdez testified that he was not sure whether he considered being a witness, and that he "apparently" decided not to. (H. 198, 199).

The record does not contain any waiver by Mr. Gardner of his right to conflict-free counsel. The transcripts and clerk's file also lack any record of Mr. Gardner's requests that counsel withdraw. Testimony from Mr. Gardner and from counsel confirms that he asked them at least twice to withdraw prior to trial. One such request occurred on the Friday before trial, and was brought to the trial judge's attention, apparently off-the-record. (H. 86-87, 127-28).

In addition to failing to withdraw because they were witnesses at the scene, trial counsel did not take steps necessary to present their theory of defense. Counsel did not obtain ballistics evidence about the impact of the gunshot, and they failed to correct witnesses' erroneous testimony that Mr. Gardner was wounded in the shoulder rather than in his chest and lung.

The State relied upon three aggravating circumstances in the guilt phase of trial. One was the circumstance set forth in Utah Code Ann. § 76-5-202(1)(h), and the State therefore was required to prove that Mr. Gardner had been previously convicted of a violent felony. Counsel did not request a bifurcated procedure to address

the prejudicial impact of revealing this information to the jury before it has considered whether he is guilty or not guilty of the acts charged.

In fact, at the beginning of the guilt phase, counsel stipulated without Mr. Gardner's permission to the existence of two convictions satisfying § 76-5-202(1)(h). (T. 766); (H. 93). Further, counsel did not investigate thoroughly to determine whether these convictions were constitutionally obtained. They did not review transcripts of Mr. Gardner's pleas or talk to his previous attorneys. (H. 223).

Mr. Gardner testified at trial, but believed that counsel coerced him into taking the stand. (H. 90). Counsel then elicited testimony from Mr. Gardner describing prior felony convictions including two robberies, attempted escape, burglary, two aggravated assaults and homicide. (T. 1186-87). Counsel believed that disclosing Mr. Gardner's felony record was necessary to "steal the thunder" from the prosecution, which would be entitled to introduce the information in cross-examination. (H.149).

Counsel called Mr. Gardner as a witness despite their belief that his testimony in the guilt phase would open the door to impeachment with his prior felony convictions and to rebuttal testimony from Wayne Jorgensen.[2] (H. 148, 152).

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[2] Jorgensen was a prison guard who claimed that, while hospitalized after the shooting, Mr. Gardner admitted that he intentionally killed Michael Burdell. At the State's request, the district court below ruled that the issue of ineffective assistance of counsel in respect to Jorgensen's testimony had been resolved on appeal, See 789 P.2d at 288, and therefore is exhausted for purposes of any federal court review.

On October 22, 1985, the jury found Mr. Gardner guilty of first degree murder. Counsel then obtained a one-day recess to prepare for the penalty phase of trial. Counsel had not obtained expert testimony to explain psychiatric, psychological or neurological conditions affecting Mr. Gardner.

In the day following the guilty verdict, counsel arranged for Mr. Gardner's evaluation by Dr. Peter Heinbecker. In the 24 hours before he testified, Dr. Heinbecker was able only to interview Mr. Gardner for about one hour, to spend a total of two-and-a-half hours with his mother and brother and to review some records. These records did not include the results of current psychological and neurological testing, because counsel had not sought these tests. Dr. Heinbecker testified that, in a case of this significance, he would have expected more time to prepare his evaluation. (H. 214). The doctor "tried to pick out . . . general factors that were important," and found in old records "some evidence of organic brain damage." (T. 1577). However, Dr. Heinbecker was cross-examined effectively by the prosecutor, whose questions established the deficiencies in the rushed, incomplete evaluation.

On direct appeal, Mr. Gardner continued to be represented by the Salt Lake Legal Defender's Association, and specifically by lawyers including Andrew Valdez and James Valdez.

However, Mr. Gardner became dissatisfied with his appellate representation, and requested that counsel withdraw. This Court eventually granted this request. The following findings of fact

from the district court describe what occurred:

> Mr. Ed Brass was appointed to replace the Salt Lake Legal Defenders Association based on petitioner's claim he received ineffective appeal. Mr. Brass filed a supplemental brief arguing there was no evidentiary record to frame the issue of ineffective assistance of counsel. In addition, it is not contested that Mr. Brass was appointed by the Supreme Court's order, a copy of which order he claims not to have received, to file a supplemental brief to address matters not previously addressed. Consequently, based on a telephone conversation with Chief Justice Hall, he understood he was appointed only to address the issue of ineffective assistance of counsel at trial. Mr. Brass claims to not have received a copy of its opinion.
>
> A further problem exists.
>
> The Supreme Court's order discharging the Salt Lake County Legal Defenders Association was not scrupulously honored. Attorney Joan Watt testified she was instructed in an informal telephone call from the Supreme Court's clerk to file the appropriate documents in Mr. Gardner's behalf after the decision affirming his conviction and sentence was announced. Although the Supreme Court had decided that he was entitled to independent counsel on the ineffective assistance issue, Ms. Watt also prepared the Supplemental Petition for Rehearing and supplemental reply to State's Response to Appellant's Petition for Rehearing, which were signed and filed by Mr. Brass.
>
> Memorandum Decision at 28.

The district court concluded that Mr. Gardner did not receive effective, conflict-free representation on appeal.

Additional facts will be referred to as necessary in the Argument section of this brief.

SUMMARY OF THE ARGUMENT

The district court correctly concluded that Mr. Gardner received ineffective assistance of counsel in his capital sentencing because counsel did not adequately or timely investigate and present mental health evidence. The court's findings of fact on this issue were based in part on its assessment of witness

credibility, and are supported by the record. Recognizing that Mr. Gardner's ability to establish prejudice was thwarted by the State's objection to the provision of expert witnesses, the district court also determined that counsel's deficient performance met the second prong of the ineffective assistance standard of Strickland v. Washington, 466 U.S. 668 (1984). The State has not established that the court clearly erred in its factual resolutions underlying the decision that Mr. Gardner is entitled to a new sentencing hearing because trial counsel were ineffective. Further, the district court correctly concluded that counsel's actions and omissions were unreasonable.

The State also has not satisfied the clearly erroneous standard of review concerning the district court's factual findings in support of its determination that Mr. Gardner's appellate counsel provided ineffective assistance.

In ruling on the remaining grounds supporting Mr. Gardner's claim that trial counsel were ineffective, the district court applied an incorrect standard of prejudice under the second prong of Strickland v. Washington. The court erred in requiring Mr. Gardner to establish that counsel's deficiencies were prejudicial "beyond a reasonable doubt." In addition, the court clearly erred in finding that Mr. Gardner waived his right to conflict-free counsel at trial, particularly with respect to counsel's violation of the witness-advocate rule.

The district court erroneously concluded that only harmless error resulted form the admission of hypnotically-enhanced

testimony from Robert Macri at trial. A review of the record shows that Mr. Macri's testimony, and its alteration followed hypnosis, was significant rather than cumulative and unimportant.

The court below also erred in ruling that there was not need for an advisement from the trial court on Mr. Gardner's right to testify or remain silent at trial, and that his right to presence was not violated.

The district court erroneously concluded that references to the victim's character and the impact of his death were not sufficient to undermine confidence in the verdict, and that any error was harmless.

The district court wrongly decided that the omission of a jury instruction defining the mitigating circumstance of duress under Utah Code Ann. § 76-3-207(2) was not error.

The court below also committed an error of law in concluding that the trial judge was not required to give an instruction stating that the prosecution had the burden of proving the existence of aggravating circumstances beyond a reasonable doubt.

Mr. Gardner's ability to present his case throughout this postconviction proceeding has been thwarted by the district court's refusal to appoint defense investigators and expert witnesses. The lack of expert and investigative assistance has resulted in a hearing which was not full and fair, and violates Mr. Gardner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 7, 9 and 12 of the Utah Constitution.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT MR. GARDNER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN THE SENTENCING PHASE OF THIS CAPITAL CASE.

The right to counsel is one of the bedrock principles of American criminal jurisprudence. Because representation by counsel is essential to guarantee other constitutional privileges, the Sixth Amendment is not satisfied unless counsel plays "the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 685 (1984). Therefore, "the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970).

Ineffective assistance of counsel is established when the record demonstrates that the attorney's performance fell below an objective standard of reasonableness considering the circumstances of the case, and that the accused was prejudiced by the incompetent representation. Strickland, 466 U.S. at 688, 692; State v. Frame, 723 P.2d 401, 405 (Utah 1986) (Per curiam). To demonstrate that he was prejudiced by counsel's error, the defendant must show a "reasonable probability that the outcome would have been different" in the absence of deficient performance. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694; 723 P.2d at 405.

The nature of the case as a capital proceeding is one of the circumstances to be considered in evaluating claims of ineffective assistance. In Strickland, the Court recognized that "[w]hen a defendant challenges a death sentence . . . , the question is

whether there is a reasonable probability that, absent [counsel's] errors, the sentence . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695.

A higher standard of competence is not required of counsel in a capital case. However, the potential severity of the punishment is a factor to be evaluated in determining whether counsel's performance was reasonable under the circumstances. Cronic, 466 U.S. at 666; Strickland, 466 U.S. at 704-06 (Brennan, J., concurring). According to the Tenth Circuit, "In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." Coleman v. Brown, 802 F.2d 1227, 1233 (10th Cir. 1986).

Because the nature and substance of the penalty phase trial "differ[s] radically in form and in issues addressed from those about the commission of a crime.... [c]apital cases require perceptions, attitudes, preparation, training, skills that ordinary criminal defense attorneys may lack." G. Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 303-04 (1983). The investigation, discovery, preparation and presentation of mitigating evidence is the most critical function of the defense in a capital case.

In this appeal, the State challenges the district court's conclusion that counsel provided ineffective assistance at sentencing because they failed to adequately investigate and present mitigating evidence. After receiving evidence from Mr.

Gardner, trial counsel and mental health professionals, and necessarily weighing their credibility in resolving conflicts in their testimony, Judge Uno found that:

> Primarily, there was inadequate investigation relating to petitioner's mental health prior to trial. Whatever evidence was presented was inadequate--too little and too late. There is dispute regarding Dr. Peter Heinbecker's testimony. Was there sufficient time and sufficient medical or psychological evaluations for Dr. Heinbecker to adequately and completely testify in behalf of petitioner? The Court is of the opinion there was not. Dr. Heinbecker was contacted a mere 24 hours before he testified.
>
> ***
>
> Dr. Mark Rindflesh, a psychiatrist, evaluated petitioner in May 1985. He apparently was not asked to testify for petitioner. . . . Dr. Agnes Plenk was asked to evaluate or testify in behalf of petitioner, but she declined. No further effort was made to seek professional assistance for petitioner, nor seek State assistance in doing so. In addition, present counsel's efforts to secure expert testimony for petitioner's evaluation was opposed by the State and sustained by this Court. As a result, no satisfactory mental health evaluation of petitioner has ever been available to petitioner to present at any hearing.
>
> Petitioner contends the deprivation of adequate evaluations has prevented petitioner from presenting any evidence of possible organic brain damage or other mitigating information which further prevented presentation of "a cohesive and understandable theory of mitigation." The Court agrees.

Memorandum Decision, at 23-24. The court also found that Mr. Gardner was prejudiced by counsel's deficient performance, and therefore ordered a new sentencing hearing.

Ignoring the findings of fact in Judge Uno's ruling, the State contends in this Court that it lacks support in the record. According to the State, "The evidence demonstrates that trial counsel expended every reasonable effort to find a psychological expert to testify on petitioner's behalf." (Brief of Appellant, at

12). This argument is refuted by a review of the record and the factual findings made by Judge Uno. The State cannot meet its burden of establishing that the district court's findings are clearly erroneous.

In its opening brief, the State presents only selected facts, contrary to it obligation to identify the evidence supporting the trial court's findings. See State v. Larsen, 828 P. 2d 487, 491 (Utah App. 1992) [(citing Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991)]. In Larsen, the court of appeals stated that:

> To prove that the trial courts findings of fact were clearly erroneous, "an appellant must marshall all evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact." Saunders v. Sharp, 806 P. 2d 198, 199-200 (Utah 1991). If an appellant fails to marshall the evidence, "the appellate court assumes that the record supports the findings of the trial court and proceeds to a review of the accuracy of the lower court's conclusions of law and the application of that law in the case." Id. at 199.
>
> 828 P. 2d at 490

There was no reasonable justification for the delay in seeking psychiatric or psychological evidence in mitigation. Andrew Valdez attempted to justify this delay by claiming that it was caused by the reluctance of expert witnesses to become involved in the case. However, the district court below made a finding of fact that the defense efforts to obtain expert assistance were limited, inconsistent with Mr. Valdez' testimony, and therefore rejected his attempted explanation.

Dr. Mark Rindflesh was asked by counsel to evaluate Mr.

Gardner shortly after the incident. He interviewed Mr. Gardner for approximately one hour during a barrier visit at the Utah State Prison on May 10, 1985. Dr. Rindflesh then wrote to Andrew Valdez a letter which included the following:

> I suspect the critical issue in trying to present as favorable a picture of Mr. Gardner as possible to the jury will be whether or not he has a conscience. Does he really feel remorse for his action? If he is so very impulsive and acts without thinking he may well feel sorry later. I did not try to get into this area of discussion since I was talking to him via telephone and could only see him through a small window. Discussing a subject such as this requires the opportunity to receive the nonverbal communication as well as the verbal. Perhaps an interview in a more open setting will be possible in the future.

(Exhibit P-1). However, Andrew Valdez testified that Dr. Rindflesh was reluctant to testify in his behalf. (H. 126).

Andrew Valdez also testified that he and co-counsel then discussed Mr. Gardner and the reports they had obtained with Dr. Agnes Plenk, a child psychologist. According to Mr. Valdez, "we thought she was going to come down and do a personal interview and any other assessments necessary, and she backed out at the last minute." Mr. Valdez testified that Dr. Plenk "just didn't want to be associated with the case." (H. 121). Mr. Valdez also said:

> We then contacted, I believe we contacted another doctor, and that could have been Dr. Lebegue or another doctor, but we found problems getting people to associate themselves with the case, because of the nature of the publicity and things of that nature.

(H. 122) (Emphasis added).

This attempted explanation is contradicted by testimony from

Dr. Rindflesh, Dr. Plenk and co-counsel, James Valdez.[3] Dr. Rindflesh testified that he did not receive any records or background information concerning Mr. Gardner from counsel. (H. 236). Dr. Rindflesh was not asked to testify for Mr. Gardner and was never given the opportunity to evaluate him in a barrier-free setting. (H. 237).

Dr. Agnes Plenk testified that Andrew Valdez and James Valdez came to her office at The Children's Center to ask her to examine Mr. Gardner or "speak in his defense." (H. 258). However, Dr. Plenk declined to do so because she had not previously had any professional contact with Mr. Gardner. (H. 257). After the meeting, which lasted about 20 minutes, Dr. Plenk immediately communicated her decision to counsel. (H. 256-57).

James Valdez verified that Dr. Plenk informed them at the end of the meeting, at least one month before trial, that she would not evaluate Mr. Gardner or testify. (H. 203,231). James Valdez did not consult with any other doctors after the conversation with Dr. Plenk. (H. 203). James Valdez did testify that their contact with Dr. Heinbecker was delayed because the psychiatrist had only recently moved to Utah. (H. 217). However, this statement was inaccurate, as Dr. Heinbecker testified that he had arrived in Utah in July 1984, more than one year before trial. (H. 204).

The State argues that counsel's failure to obtain a timely and

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[3]Even if the excuse offered by Andrew Valdez was accurate, he did not ask the trial court to appoint an expert to assist in presenting mitigation and did not seek to find an expert from another state, who would not have been affected by negative publicity. (H. 180)

thorough assessment of mental health mitigation was reasonable strategy because experts who were contacted had only unfavorable evaluations. The district court did not make this finding, and as explained below, it is not supported by the record. In addition, if there were any negative evaluations, they were based on examinations that were incomplete and unreliable, as outlined below. Therefore, based on his review of the testimony and other evidence, Judge Uno declined to find that counsel's inaction was strategic.

Andrew Valdez also claimed that the failure to timely obtain mental health testimony was based on the fact that he had received evaluations diagnosing Mr. Gardner as sociopathic. However, when asked who had provided these diagnoses before Dr. Heinbecker's evaluation, Mr. Valdez identified only Roger Pray, a Utah State Prison psychologist, and Dr. Rindflesh. (H. 179-80).

Mr. Valdez admitted that he didn't "necessarily" accept the prison psychologist's conclusions and felt it was important to obtain an independent evaluation. (H. 123). Further, Dr. Rindflesh demonstrated a willingness to cooperate rather than a reluctance to get involved, and he did not provide a specific diagnosis in his report. (Exhibit P-1).

Counsel did not seek any psychological testing before Dr. Heinbecker's evaluation, and testing was not possible when he did enter the case, because it was so late in the day. Counsel specifically did not arrange to have Mr. Gardner tested for organic brain syndrome. (H. 164). Mr. Gardner had been ill with spinal

meningitis as a child, and he had a history of sniffing inhalants. (H. 162,164). Andrew Valdez testified that Dr. Heinbecker told them organic brain damage was "insignificant". (H. 164,165).

However, this assertion is contradicted by Dr. Heinbecker's penalty phase testimony. An indication in early records that Mr. Gardner had organic brain damage was one of the four factors Dr. Heinbecker described as important. (T. 2796). In cross-examination, however, the prosecutor and Dr. Heinbecker discussed whether organic brain syndrome had been concretely diagnosed or was merely mentioned as a possibility, and Dr. Heinbecker maintained that sufficient testing had not been conducted in Mr. Gardner's earlier evaluations. By questioning Dr. Heinbecker about records he had not reviewed, the prosecutor was able to negate the suggestion that organic brain syndrome could be important. Dr. Heinbecker could not point to any current testimony in response because none had been sought by counsel.

Dr. Heinbecker testified before the district court that the psychological testing not obtained by counsel, including specific tests for organic brain syndrome, would have been helpful in formulating his diagnosis. (H. 214-15). These tests should have been conducted before Mr. Gardner's evaluations by Dr. Rindflesh and Dr. Heinbecker. The inaccurate assertion that Dr. Heinbecker told counsel in the 24 hours before he testified that organic brain syndrome was "insignificant" does not excuse the failure to timely obtain an assessment of the disease. Without this information, counsel could not adequately evaluate potential mitigating

evidence. In fact, Andrew Valdez did not know, and still does not understand, how to determine or prove the presence of organic brain syndrome. (H. 165).

The district court correctly held that counsel's lack of preparation and investigation resulted in a haphazard, ineffective presentation of mitigation evidence and was not reasonable under the circumstances:

> "If trial counsel does not adequately investigate the underlying facts of a case, . . . counsel's performance cannot fall within the 'wide range of reasonable professional assistance.'" State v. Templin, 805P. 2d at 188 (citations omitted).

Trial counsel did not provide the medical experts who evaluated Mr. Gardner with current test results or critical information about his background, history and, as a result, their assessments were not reliable. An accurate forensic psychiatric examination requires careful assessment of medical and organic factors contributing to or causing psychiatric or psychological dysfunction. See H. Kaplan and B. Sadock, Comprehensive Textbook of Psychiatry, 543 (4th ed. 1985).

The recognized method of assessment includes the following steps: (1) An accurate medical and social history must be obtained. See R. Straub & F. Black, Organic Brain Syndromes 42 (1981); Kaplan & Sadock at 837; (2) Historical data must be obtained not only from the patient, but from sources independent of the patient. Kaplan & Sadock at 488. See also, American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic

Psychiatry 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davison, Forensic Psychiatry 38-39 (2d ed. 1965); (3) A thorough physical examination (including neurological examination) must be conducted. See, e.g., Kaplan & Sadock at 544, 837-38 & 964; and (4) Appropriate diagnostic studies must be undertaken in light of the history and physical examination.[4] These authorities establish that the standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment. See Kaplan & Sadock, at 835.

Based on counsel's unreasonable failure to investigate mitigating mental health evidence, the district court held that Mr. Gardner had received ineffective assistance and specifically found that prejudice was sufficiently established under the circumstances.[5]

"The sentencing hearing is counsel's chance to show the jury

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[4] The psychiatric profession recognizes that psychological tests, CT scans, electroencephalograms, and other diagnostic procedures may be critical to determining the presence or absence of organic damage. In cases where a thorough history and neurological examination still leave doubt as to whether psychiatric dysfunction is organic in origin, psychological testing is clearly necessary. See Kaplan & Sadock at 547-48; Pollack at 273. Moreover, among the available diagnostic instruments for detecting organic disorders, neuropsychological test batteries have proven to be critical. See Filskov & Goldstein, Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery, 42 J. of Consulting & Clinical Psych. 382 (1974); Schreiber, Goldman, Kleinman, Goldfader, & Snow, The Relationship Between Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment, 162 J. of Nervous and Mental Disease 360 (1976).

[5] See Argument X, below.

that the defendant, despite the crime, is worth saving as a human being." Mak v. Blodgett, 970 F.2d 614, 619 (9th Cir. 1992). Here, however, as the district court held, trial counsel did not present "a cohesive and understandable theory of mitigation." Memorandum Decision, at 24.

As it did in the court below, the State contends that "no attempt was made t explain [organic brain syndrome] or how it applied to petitioner's case." (Brief of Appellant, at 14). In addition, the State complains that Mr. Gardner did not present evidence that he in fact suffers form organic brain syndrome or that other mitigating information exists. The State argues that any finding or prejudice is only speculative.

However, the State ignores the simple fact that MR. Gardner, as an indigent person on death row, did not have the money to hire expert witnesses and investigators. Mr. Gardner sought the appointment of experts and investigators necessary to discover and evaluate mitigating information; the States strenuously opposed all requests for expert and investigative assistance. The state's argument that Mr. Gardner did no produce concrete evidence -- which could have been presented if he had been provided with experts and investigators -- is disingenuous at best.

Further, unlike the defendant in the case cited byt eh State, Mr. Gardner's efforts to show that he was prejudiced did not rest only on y the claim of "some conceivable impact," and the record does not demonstrate that he "made no effort to delineate any prejudice." State v. Lowell, 758 P. 2d 909, 913 (Utah 1988).

Mr. Gardner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article 1, §§ 7, 9 and 12 of the Utah Constitution were violated.[6] The district court below correctly found that he should be provided a new sentencing hearing. As the State has not demonstrated that the facts found by the court are clearly erroneous and that its legal conclusions are incorrect, this Court must affirm the order for resentencing.

II. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT MR. GARDNER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

Testimony at the evidentiary hearing established that Mr. Gardner initially was represented on appeal by the Salt Lake Legal Defenders Association. However, as the appeal progressed, Mr. Gardner was dissatisfied with this representation and requested that counsel withdraw. After originally denying Mr. Gardner's request, the Utah Supreme Court later ordered attorneys from the Salt Lake Legal Defenders Association to withdraw. Attorney Ed Brass was appointed to represent Mr. Gardner, but did not receive copies of the Order appointing him, which broadly defined the scope of his representation. (H. 282). Instead, Mr. Brass believed based on a telephone conversation with Chief Justice Hall that he was to proceed only on the issue of ineffective assistance of trial counsel. (H. 281-82).

Mr. Brass had represented co-defendant Carma Hainsworth in the

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[6] See State v. Sireci, 536 So.2d 231 (Fla. 1988) (where court-appointed psychiatrist failed to order necessary testing, defendant deprived of due process); Mason v. State, 489 So.2d 734 (Fla. 1986) (mental status examination of defendant flawed because physicians did not know of extensive history of mental disorders).

trial court, but did not believe that this created a conflict of interest because her case was completed. (H. 282-83). Mr. Brass prepared a supplemental brief which argued that Mr. Gardner's ineffective assistance claim was not ripe for review, but did not raise any additional issues. When the supreme court affirmed Mr. Gardner's conviction, Mr. Brass did not receive a copy of the opinion from the supreme court. (H 284). Mr. Brass filed a Petition for Rehearing, although it actually had been prepared by attorney Joan Watt from the Legal Defenders Association. (H. 285-86). See Exhibit P-2.

These exceptional circumstances establish that appellate counsel for Mr. Gardner operated under an actual conflict of interest, which adversely affected their performance. The trial court correctly found that Mr. Gardner did not receive effective, conflict-free representation on appeal. See Evitts v. Lucey, 469 U.S. 387 (1985). The State argues that the district court misconstrued the circumstances of the Ed Brass appointment and that there was no deficient performance. Again, the State does not discuss the court's findings of fact on this issue, which accord with the recitation above and are found at page 28 of its Memorandum Decision, or otherwise support any attempt to establish that they are clearly erroneous. The State also claims that Mr. Gardner was required to show prejudice after the district court found that he did not receive representation from an independent advocate. This argument is contrary to decisions that hold a showing of Strickland prejudice is not required when an actual

conflict of interest exists. E. g., Osborn v. Shillinger, 861 F. 2d 612 (10th Cir. 1988). The State also contends that the district court erred in ordering a new appeal. Just as a remedy for ineffective assistance at trial is a new trial, a new appellate process is the only way to rectify the problem of deficient representation on appeal. The appropriate remedy here is to allow an appeal at which Mr. Gardner could be represented by independent counsel. The fact that claims are now presented in postconviction is no substitute for independent evaluation of issues on direct appeal. Cf. Wilson v. Wainwright, 474 So. 2d 1165 (Fla.1985) (Florida Supreme Court's independent review of records on appeal does not substitute for effective assistance of appellate counsel, and petitioner was entitled to a new direct appeal.)

III. MR. GARDNER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND SENTENCING, ON THE GROUNDS ARGUED BELOW IN ADDITION TO THE SIXTH AMENDMENT VIOLATIONS FOUND BY THE DISTRICT COURT.

A. Conflicts of Interest

In addition to the guarantee of reasonably competent representation, the Sixth Amendment right to counsel incorporates the right to counsel's undivided loyalty. Holloway v. Arkansas, 435 U.S. 474 (1977); United States v. Burney, 756 F.2d 787, 790 (10th Cir. 1985); State v. Brown, No. 900148 (Utah November 30, 1992); State v. Smith, 621 P.2d 697 (Utah 1980). To establish a Sixth Amendment violation based on a conflict of interest, a defendant who does not object at trial must show that his attorney actively represented conflicting interests and that an actual

conflict of interest adversely affected his lawyer's performance. However, a further showing of prejudice is not required. United States v. Bowie, 892 F.2d 1494 (10th Cir. 1990); State v. Webb, 790 P.2d 65, 73 (Utah 1990). Prejudice is presumed because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." Strickland v. Washington, 466 U.S. at 692.

Both the Utah Rules of Professional Conduct,[7] effective January 1, 1988, and the previous Code of Professional Responsibility[8] prohibit Mr. Gardner's representation by Andrew Valdez and James Valdez because they witnessed events surrounding his apprehension. This Court has addressed the advocate-witness rule in State v. Leonard, 707 P.2d 650 (Utah 1985). This Court recognized in Leonard that:

> The great weight of authority, however, is that it is error for counsel to continue representation where he or she is or ought to be a witness with respect to issues that are not incidental or insignificant. It is widely recognized that the credibility of an attorney who acts as a witness in his client's case, as well as his effectiveness as an attorney in

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[7]Rule 3.7(a) provides that "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) The testimony relates to an uncontested issue; (2) The testimony relates to the nature and value of legal services rendered in the case; or (3) Disqualification of the lawyer would work substantial hardship on the client."

[8]DR 5-102(A) precluded a lawyer from serving as an advocate if the lawyer "learned or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client." DR 5-102(B) provided that a lawyer could continue representation as a potential witness other than on behalf of his client "until it is apparent that his testimony is or may be prejudicial to his client."

> that case, may be seriously compromised.
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> Experience teaches that the roles of advocate and witness should be separated. If an attorney attempts to combine the two roles, he is likely to be less effective in each role. "That counsel should avoid appearing both as advocate and witness except under special circumstances is beyond question." United States v. Morris, 714 F.2d 669, 671 (7th Cir. 1983).

707 P.2d at 653 (Other citations omitted). (Emphasis added.)

Counsel's representation was improper although Andrew Valdez has stated that his potential testimony might have countered Mr. Gardner's theory of defense, (H. 137). This conflict similarly was not excused by James Valdez' explanation that he did not testify because he didn't believe he "could add anything" to the facts presented at trial, as he did not know how much time had passed between the occurrence and his observations of Mr. Gardner, (H. 199).

"A different attorney would be in a better position to assess the existence and extent of any personal knowledge which [counsel] may have, and whether he would be of any benefit...as a defense witness." United States v. Seigner, 498 F.Supp. 282, 286 (E.D. Pa. 1980).

Further, the advocate-witness rule does not depend on whether counsel will be or is actually called to testify, but rather, "on whether he 'ought to be called as a witness' in the underlying action." Groper v. Toff, 717 F.2d 1415, 1418 (D.C. Cir. 1983) (Per curiam). Accord, e.g., United States v. Cannistraro, 794 F. Supp. 1313, 1321 (D. N.J. 1992) ("Prejudice to the client has been found

when the mere presence of defense counsel at trial would distort the fact-finding process or when defense counsel would become an unsworn witness"); United States v. Gotti, 771 F. Supp. 552, 561-63 (E.D.N.Y. 1991) (Regardless of whether counsel would be called to the stand, he could not present defense without acting as an unsworn witness).

Here, Andrew Valdez recognized that their defense depended on information from "witnesses who talked to [Mr. Gardner] shortly after he'd been shot." (H. 134). In the defense case, counsel called Brad Snow, a witness who had observed Mr. Gardner leave the courthouse and collapse on the lawn outside. Mr. Snow described Mr. Gardner's demeanor as "confused," but in cross examination the prosecutor established that he was approximately 150 feet away. (T. 2475, 2477). Additionally, James Valdez attempted during cross-examination of a prosecution witness to introduce facts about his own conduct at the scene. (T. 2340).

Bringing this matter to the jury's attention "would cause any argument to the jury about that testimony to be viewed as a statement of a witness as well as of an advocate." United States v. Iorizzo, 786 F.2d 52, 57 (2nd Cir. 1986); accord, Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988).

Under these circumstances, trial counsel were potential witnesses and were obligated to withdraw from representation. The failure of Mr. Gardner's trial attorneys to recognize their duty to withdraw resulted in the denial of his right to effective counsel, and violated his rights under the Sixth and Fourteenth Amendments

and the Utah Constitution.

Andrew Valdez and James Valdez also had conflicts of interest because they knew Nick Kirk, whom Mr. Gardner shot in attempting to leave the basement, and other witnesses. James Valdez testified that they discussed these matters with Mr. Gardner. "I think finally, on the record, Ronnie waived, we asked if he was willing to waive that possibility that we may be witnesses[9] or that we knew individuals, we knew all the courtroom personnel, that sort of thing." Mr. Valdez believed that Mr. Gardner waived potential conflicts, on the record in district court. (H. 197).

However, the record of the proceedings in district court does not contain any discussion of the subject or any waiver by Mr. Gardner. Andrew Valdez testified that he did not think the fact that he had been a witness at the scene created a conflict of interest. (H. 137-38). In light of his failure to recognize the conflict, it is doubtful that he obtained even an off-the-record, informal waiver from Mr. Gardner. Counsel had an obligations to bring these matters to the court's attention. See Cuyler v. Sullivan, 446 U.S. 335, 346 (1980).

Additionally, there was animosity between Mr. Gardner and counsel, particularly Andrew Valdez. Andrew Valdez testified that he and Mr. Gardner "had a lot of problems," primarily dissatisfaction about confinement conditions. (H. 117). At one point, Mr. Gardner attempted to plead guilty because he believed it

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[9]James Valdez testified that he was not sure whether or not he considered being a witness, and that he did contemplate testifying but "apparently" decided not to do so. (H. 198,199).

was the only the way to get out of the "hole." (T. 1088-94). He felt that Mr. Valdez was not doing anything to help the confinement situation. (H. 88). The attorney-client relationship seemed to be "hot and cold." (H. 86,117). According to James Valdez, the variations in Mr. Gardner's emotional conditions were justifiable, under the circumstances. (H. 230).

Mr. Gardner asked counsel to withdraw two times, including on the Friday before trial started. (H. 87,127). This matter apparently was brought to the attention of the prosecutor and the trial court, although it does not appear in the record. The trial judge either denied Mr. Gardner's request because trial was imminent, or it was withdrawn after further discussion with counsel. (H. 87,127-28).

The United States Supreme Court has emphasized that "Death is . . . different." Gardner v. Florida, 430 U.S. 349, 358 (1977). Capital cases create unique pressures, and it is imperative that the accused trust in his attorney. See G. Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 321, 323 (1983). Proceeding to trial with a capital defendant who has just sought counsel's withdrawal is an untenable situation. Counsel did not seek a continuance, ensure that a record of Mr. Gardner's dissatisfaction was preserved or withdraw so that Mr. Gardner could be represented by lawyers who did not have a turbulent relationship with him.

In addressing these conflicts, the district court noted that no record of any waiver had been found. Nonetheless, the court

stated that "the problems regarding the Valdezes representing petitioner was discussed with petitioner and petitioner waived any issued of conflict of interest."

With due respect to the district court, this finding is clearly erroneous as it is unsupported by the records. The evidence in support to the finding is testimony from James Valdez that he thought Mr. Gardner waived any conflict on the records. (H. 197). However, James Valdez testimony also demonstrates uncertainty about whether he even considered being a witness, let alone obtaining a valid, informed waiver on the records. (H. 198, 199). Andrew Valdez did not even treat his presence at the scene as a conflict requiring a waiver. (H. 137-138).

The district court additionally erred in concluding that Mr. Gardner was not entitled to relief because any conflicts of interest were outweighed by the fact that "there is no prejudice beyond a reasonable doubt." Memorandum Decision, at 24. As explained above, a showing of prejudice is not required when an actual conflict of interest is demonstrated. This erroneous legal standard requires reversal of the district court's decision denying relief on the basis of counsel's conflict of interest.

B. Inadequate Representation

When a claim of ineffective assistance is not based on a conflict of interest, reversal is required if a defendant establishes that counsel's performance was deficient and that the deficiency prejudiced the defense. The "deficient performance" prong is satisfied by proof that counsel's representation "fell

below an objective standard of reasonableness," based on prevailing professional norms. Strickland, 466 U.S. at 688; State v. Frame, 723 P.2d 401, 405 (Utah 1986) (Per curiam). The "prejudice" prong of the test is met by demonstrating a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." 466 U.S. at 694, 723 P.2d at 405.

The district court rejected Mr. Gardner's additional claims that he received ineffective assistance of counsel at the trial on the merits. According to the court below, the State presented overwhelming evidence of Mr. Gardner's guilt at trial, and therefore he could not be prejudiced by any errors or omissions of counsel. The court's ruling on this issue was erroneous, because there is a reasonable likelihood that jurors would have found Mr. Gardner guilty only of a lesser offense trial counsel had been effective advocates.

Throughout its decision below, the district court held that, although there was some deficiency in counsel's performance, there was no prejudice because of the weight of the direct evidence of guilt. Memorandum Decision, at 14. The court then ruled on specific grounds asserted by Mr. Gardner that, "the deficiency was not prejudicial beyond a reasonable doubt." E. g., Memorandum Decision at 19, 21, 23, 26. The district court applied a clearly erroneous legal standard in requiring Mr. Gardner to show beyond a reasonable doubt the result would have been different but for counsel's errors and omissions.

Counsel did not effectively investigate and present the

defense that Mr. Gardner did not intend to kill Michael Burdell and that the shooting was "essentially a reaction, a reaction after having been shot." (H. 131). No reasonable explanation has been provided for the failure to clarify for jurors that Mr. Gardner suffered a wound to his chest and lung, rather than simply to his shoulder. Throughout the trial, witnesses referred inaccurately to Mr. Gardner's "shoulder" wound and counsel did not correct this error. Counsel further perpetuated this mischaracterization by referring to a shoulder wound in briefs filed in the direct appeal.

Counsel also failed to investigate whether ballistics evidence was available to support the defense. At the trial, counsel cross-examined Raymond Cooper in an attempt to explore the impact of the shot. Mr. Cooper testified that he could not discuss this matter because his expertise was in firearms identification rather than ballistics. (T. 1157-59). Counsel did not call any witnesses or present any evidence on this issue. It is clear from counsel's testimony before the district court that there was no strategic reason for this omission.[10] Ballistics testimony would have been significant, as indicated by the fact that counsel sought unsuccessfully to elicit information from a witness not qualified on that topic. The district court agreed that there was "some"

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[10] Andrew Valdez testified that he "believed" he talked to a ballistics expert, who "probably would have been Ed Barton," an investigator in the Salt Lake Legal Defenders Association. (H. 133,135). However, Mr. Valdez could not remember whether Mr. Barton provided a report or why the defense did not present testimony from an expert in ballistics. (H. 134,135,136). James Valdez testified that he could not remember whether they sought ballistics testing, and said "I don't think we thought it was a question of ballistics." (H. 226-27).

deficiency in counsel's failure to present their defense adequately. However, the court found that there was no prejudice because of the extent of direct evidence showing Mr. Gardner's guilt. However, this evaluation necessarily is affected by counsel's failure to competently present their defense. The district court erred in concluding that Mr. Gardner suffered no prejudice.

Counsel's decision that Mr. Gardner should testify in the trial on the merits also was not reasonably competent. Counsel believed that Mr. Gardner's prior convictions would be admitted to impeach if he were to testify and knew that jurors "would have a totally different picture of Ronnie Lee Gardner" once that happened. (H. 148). They additionally were aware that the prosecution would offer the testimony of Corrections Officer Jorgensen in rebuttal if Mr. Gardner testified. (H. 151-52). Counsel also knew that Mr. Gardner would refuse to disclose the name of the woman who handed him the gun on the morning of April 2, 1985, and that his refusal "was going to hurt." (H. 155).

In the hearing, Mr. Gardner said that he was reluctant to testify because his prior convictions would then be admitted. (H. 89). Although Andrew Valdez testified that Mr. Gardner wanted to take the stand, he also admitted that Mr. Gardner "may have had reservations at one point," and that "there was days" when Mr. Gardner did not want to testify. (H. 147). Mr. Gardner believes that he was coerced into testifying, because his brother was asked by Andrew Valdez to write to him and urge him to take the stand.

(H. 90-92,158). Counsel acted unreasonably in deciding that Mr. Gardner should testify and exerting pressure to gain his acquiescence.

Near the beginning of Mr. Gardner's testimony, counsel elicited the information that he had been convicted of numerous felonies, including two robberies, attempted escape, burglary, two aggravated assaults and homicide.[11] (T. 1186-87). At the evidentiary hearing, Andrew Valdez testified that this was an attempt to "steal the thunder" by disclosing Mr. Gardner's record before it was admitted by the prosecution to impeach his testimony. (H. 149). If these convictions were admissible to impeach Mr. Gardner, trial counsel's decision would have been reasonable. However, these convictions were inadmissible under Rule 609 of the Utah Rules of Evidence.

Rule 609 provides that a defendant's testimony can be impeached with evidence that he has been convicted of a crime which "involved dishonesty or false statement," or a felony not involving dishonesty or false statement only if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect." State v. Banner, 717 P.2d 1325 (Utah 1986); State v. Gentry, 747 P.2d 1032 (Utah 1987). In the absence of a showing of specific facts indicative of fraudulent action, the crimes of theft, second degree burglary and robbery ordinarily do not involve dishonesty or false statement. State v. Bruce, 779

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[11]In cross-examination, the prosecutor brought up an additional conviction for escape. (T. 1214).

P.2d 646 (Utah 1989); State v. Lanier, 778 P.2d 9 (Utah 1989); State v. Brown, 771 P.2d 1093 (Utah App. 1989); State v. Wight, 765 P.2d 12 (Utah App. 1988). The prior convictions elicited by counsel therefore were not admissible under this part of Rule 609.

If the prosecution had sought admission under the other clause in the rule, it would have had to establish that the probative value of each conviction outweighed its prejudicial impact. Because the nature of Mr. Gardner's convictions are not probative of his character for veracity and they were similar to the offenses for which he was on trial, so as to be extremely prejudicial, admission of these convictions over an objection would have been an abuse of discretion. Gentry, 747 P.2d at 1037-38. Because Mr. Gardner's prior convictions were inadmissible, there was no strategic or tactical reason for their introduction in his direct examination. (H. 168). See State v. Morehouse, 748 P. 2d 217, 220-221, (Ut. App. 1988) (Jackson,J. dissenting) cited with approval in Bruce, 779 P. 2d at 656. The district court denied relief on this ground because it ruled that Utah law at the time of Mr. Gardner's trial allowed introduction of his felony history for impeachment purposes. Memorandum Decision, at 17. This legal conclusion is erroneous.

Although Banner and Gentry had not been decided, Rule 609 had been in effect since for two years at the time of Mr. Gardner's trial. The rule's departure from the former practice of admitting all felony convictions to impeach was signaled in the Advisory Committee Note, which stated that "This rule is the federal rule,

verbatim, and changes Utah law by granting the court discretion in convictions not involving dishonesty or false statement to refuse to admit the evidence if it would be prejudicial to the defendant. Current Utah law mandates the admission of such evidence." Treatises interpreting the identical federal provision also provided a framework for arguing that Mr. Gardner's prior convictions were not admissible to impeach under Rule 609. E.g., M. Graham, Handbook of Federal Evidence, §§ 609.2, 609.4 (1981); 3 D. Louisell & C. Mueller, Federal Evidence, § 316 (1979).

Mr. Gardner also was prejudiced by counsel's failure to request a bifurcated procedure to deal with an aggravating circumstance based on prior convictions. One of the three statutory aggravating circumstances to be proved at trial was the allegation that Mr. Gardner "was previously convicted of...a felony involving the use or threat of violence to a person." Utah Code Ann. § 76-5-202(1)(h). When this aggravating circumstance is asserted, it is error to introduce evidence of any alleged prior convictions in the guilt phase, before the jury has determined whether the accused is guilty of an intentional or knowing killing. A bifurcated procedure is required to alleviate prejudice to the accused. State v. Florez, 777 P.2d 452, 458 (Utah 1989); State v. James, 767 P.2d 549 (Utah 1989).

Although Florez and James were decided after Mr. Gardner's trial, counsel should have been alerted to the prejudicial impact of admitting prior convictions under § 76-5-202(1)(h). As the Utah Supreme Court recognized in James, bifurcated proceedings had been

required in other contexts "to insure that such prejudice based upon a defendant's 'status' as a previously convicted felon will not taint a jury's fact finding task." 767 P.2d at 556. Counsel's unreasonable decision that Mr. Gardner should testify, their introduction of his prior convictions and their failure to request a bifurcated proceeding were errors which intensified each other's effect and prejudiced Mr. Gardner.

The district court recognized that Mr. Gardner's contentions on these issues were "very strong". Memorandum Decision, at p. 18. However, the court ruled, "Again, based on the strength of the direct evidence regarding petitioner's guilt, the Court finds that assistance of counsel may represent some deficiency in the above facts, but rules that the deficiency was not prejudicial beyond a reasonable doubt." Memorandum Decision, at p. 19. The court erroneously applied the reasonable doubt standard to the Strickland prejudice prong, which correctly requires Mr. Gardner to show only a "reasonable probability" of a different outcome. This Court should remand these issues back to the district court, with instructions to apply the correct and more lenient definition of prejudice.

IV. MR. GARDNER'S CONVICTION MUST BE VACATED BECAUSE IT WAS BASED ON HYPNOTICALLY ENHANCED TESTIMONY.

Hypnotically enhanced testimony is inadmissible in Utah, because its "inherent unreliability . . . is well established." State v. Tuttle, 780 P.2d 1203, 1210 (Utah 1989); accord, State v. Mitchell, 779 P.2d 1116 (Utah 1989). See also, Rock v. Arkansas,

483 U.S. 44, 59-60 (1987). The Arizona Supreme Court, which this Court has cited with approval on the issue, has summarized:

> (1) The subject under hypnosis is extremely susceptible to suggestions given intentionally or unintentionally by the hypnotist or others present during the session. The source of suggestions could be verbal or nonverbal cues given by the hypnotist of which even the hypnotist is unaware.
>
> (2) The subject is likely to confabulate by filling in details of memory gaps to make his account of events more logical, complete, and acceptable. Additionally, it is impossible for either the subject or a hypnosis expert to determine whether a given piece of information is actual memory or confabulation, absent independent verification such as a record of the subject's pre-hypnotic recall.
>
> (3) The subject may confound memories evoked under hypnosis with prior recall. Thus, it becomes impossible to distinguish between memories of impressions existing before hypnosis and memories of impressions generated during hypnosis.
>
> (4) The subject of hypnosis develops a distorting desire to please the hypnotist.
>
> (5) The subject of hypnosis generally becomes absolutely confident in the accuracy of his recall, thereby unfairly impairing effective cross-examination of the subject about the event.
>
> (6) The subject loses critical judgment because he is willing to speculate and then give credence to such speculation.

State ex rel. Neely v. Sherrill, 799 P.2d 849, 852-53 (Ariz. 1990) (Citations omitted).

In Tuttle, this Court held that a witness who has been hypnotized may testify, but his or her testimony must be limited to "prehypnotic recall as it has been recorded before hypnosis." 780

P.2d at 1211. The scope of testimony from a previously hypnotized witness should be determined prior to trial. 780 P.2d at 1211, n.10. Additionally, testimony deviating from recorded prehypnotic recall may be stricken and expert testimony could also be admitted to explain the witness's unwarranted confidence in the improper testimony and the unreliability of the post-hypnotic "recollection." 780 P.2d at 1212.

In the instant case, Robert Macri was a crucial witness. Mr. Macri was in the basement archives room when Mr. Gardner attempted to escape from prison officers at about 9 a.m. on April 2, 1985. Mr. Macri and Michael Burdell hid behind the door from the foyer into the archives room. Mr. Gardner entered the room and walked past them, then turned. Mr. Gardner shot Mr. Burdell, who had been hiding closest to the hinge of the door, and Mr. Macri left the room by going around the door, which was swinging shut or had been closed.

In the evidentiary hearing, Mr. Macri testified that he had been uncertain about how the door had closed. (H. 26). During the summer of 1985, Mr. Macri and his wife were receiving marriage counseling from Dr. Elliott Landau. Because Mr. Macri was under a lot of pressure and "really mystified," Dr. Landau placed him under hypnosis to help him recall what had happened. (H. 27). At the end of this session, which probably occurred in August 1985, (H. 27), Dr. Landau gave Mr. Macri a posthypnotic suggestion that he would continue to think about the matter until he resolved the issue. (H. 28-29). At some later time, as Mr. Macri and a friend

were driving to California, "all of the sudden I saw that I had used the door as a shield and had pulled it closed behind me." (H. 29).

Mr. Macri explained that his trial testimony reflected this understanding and therefore differed from his preliminary hearing testimony. (H. 29). At the preliminary hearing, Mr. Macri testified that the door started to close, he began to go around it and he heard the shot "practically simultaneously." (T. 960-61, 964). Mr. Macri also stated that the gun was pointed at his head when Mr. Burdell said "Oh, my God." Then, "I just ducked. For no reason at all, I ducked and went around the swinging door, and the gun went off." Mr. Macri was "coming around the door" when the shot was fired. (T. 949). At trial, Mr. Macri testified that he was holding the door and keeping it from closing. According to his testimony, Mr. Gardner walked past them, turned, and pointed the gun at him. (T. 2215). Mr. Macri testified that Mr. Burdell said "Oh, my God," Mr. Gardner moved the gun and:

> When it got to the point exactly between Mike and myself--which was 18 inches, at the most, the space between us--when he got to just the halfway point, I ducked and went out the door as I believe that I was holding the door at that time. I was keeping the door from closing.

(T. 2217).

These two versions differed materially. Mr. Macri's testimony at the preliminary hearing supported the theory that the shooting of Mr. Burdell was not an intentional killing, because the defense could argue that Mr. Gardner, who was bleeding from a gunshot wound

in the chest, had been startled when the door suddenly began to close and Mr. Macri moved out. However, the trial testimony indicates that Mr. Gardner was already moving the gun toward Mr. Burdell when Mr. Macri let go of the door and it began to close.

As was the evidence in Tuttle and Mitchell, Mr. Macri's hypnotically enhanced testimony was truly unreliable and was inadmissible as a matter of Utah evidentiary law. The district court below erred in concluding that Mr. Gardner's trial was not affected by the use of post-hypnotic testimony. The court erroneously speculated that the change in Mr. Macri's testimony was caused by something other than his hypnosis session. Memorandum Decision, at 6. Additionally, the district court mistakenly concluded that Mr. Macri was not an important witness and that his testimony was merely cumulative.

Additionally, although this Court in Tuttle did not decide whether the use of hypnotically enhanced testimony can violate a defendant's due process and confrontation rights, 780 P.2d at 1213, other courts have determined the existence of constitutional violations on a case-by-case basis. E.g., Bundy v. Dugger, 850 F.2d 1402, 1415 (11th Cir. 1988); Harker v. State of Maryland, 800 F.2d 437 (4th Cir. 1986). In the instant case, any lack of knowledge that Mr. Macri's testimony was hypnotically enhanced merely exacerbates these constitutional violations.

Dr. Landau testified that Mr. Macri's was hypnotized without the safeguards normally expected in a hypnosis session conducted for forensic purposes, which include obtaining sufficiently

detailed information about prehypnotic recall and video and audio tapes of the session itself. (H. 60). The absence of these precautionary measures made Mr. Macri's hypnotically enhanced testimony particularly untrustworthy. Further, if trial counsel were not aware at the time of trial that Mr. Macri had been hypnotized, then their ability to effectively cross-examine him was frustrated. Jurors were not informed that Mr. Macri had been hypnotized and were not aware of his explanation for the change in his testimony. There was no expert testimony to analyze the hypnosis session itself, or to describe the effects of hypnosis.

The use of this testimony therefore did not comport with due process of law, and violated Mr. Gardner's right to confront the witnesses against him. U.S. Const., Am. VI, XIV; Utah Const., Art. I, §§ 7, §12. Mr. Gardner's conviction and sentence must be vacated unless the State establishes that this error was harmless beyond a reasonable doubt. Even under the evidentiary standard announced in Mitchell and Tuttle, reversal is required because, in the absence of this testimony, there was a reasonable likelihood of a more favorable result in either the guilt or penalty phase of trial.

V. THE TRIAL COURT ERRED IN FAILING TO ADVISE MR. GARDNER OF HIS RIGHTS TO TESTIFY OR REMAIN SILENT.

The district court below erroneously rejected Mr. Gardner's contention that an advisement concerning his right to testify or

remain silent should have been given by the trial court.[12] Because these two corollary rights are fundamental and personal privileges, see, e.g., Rock v. Arkansas, 483 U.S. 44 (1987); Brooks v. Tennessee, 406 U.S. 605 (1972); Malloy v. Hogan, 378 U.S. 1 (1964), their waiver must be voluntary, knowing and intelligent. Johnson v. Zerbst, 304 U.S. 458 (1938). To make an effective decision about whether or not to testify, and thereby validly waive the right to testify or to remain silent, the accused should be advised of these rights, of the consequences of testifying or not testifying, and of the fact that the decision is his to make notwithstanding counsel's advice.

An advisement from the trial court is necessary to protect against the possibility that counsel will undermine or supplant the defendant's decision whether to take the stand or decline to testify. See People v. Curtis, 681 P.2d 504 (Colo. 1984). The instant case demonstrates the need for an adequate advisement from the court: Mr. Gardner felt that counsel coerced him into testifying at trial, although he personally did not want to do so. (H. 89, 90). Here, an adequate advisement from the trial judge would have alleviated the effect of counsel's undue pressure coercion on Mr. Gardner, and was necessary to protect his rights under the state and federal constitutions. U.S. Const, Am. VI, VIII, and XIV; Utah Const., §§ 7, 9 and 12.

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[12] The record does not contain an advisement on these issues, although Valdez testified that the trial court informed Mr. Gardner of matters concerning his right to testify. (H. 154).

VI. MR. GARDNER'S RIGHT TO PRESENCE WAS VIOLATED WHEN THE TRIAL COURT CONDUCTED PRETRIAL PROCEEDINGS IN THIS CAPITAL CASE WHILE HE WAS ABSENT.

The due process right of the accused to be present during judicial proceedings is one of the most fundamental rights guaranteed by the United States Constitution. See, e.g., Diaz v. United States, 223 U.S. 442, 447-48 (1912); Lewis v. United States, 146 U.S. 370 (1892); Hopt v. Utah, 110 U.S. 574, 579 (1884). Recently, the United States Supreme Court reaffirmed the continuing validity of this right:

> The Court has assumed that, even in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-06 ... (1934). Although the Court has emphasized that this privilege of presence is not guaranteed "when presence would be useless, or the benefit but a shadow," ... at 106-07, ... due process clearly requires that a defendant be allowed to be present "to the extent that a fair and just hearing would be thwarted by his absence," ... at 108, ... Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.

Kentucky v. Stincer, 482 U.S. 730, 745 (1987). A defendant's right to presence also is recognized in Article I, § 12 of the Utah Constitution. State v. Houtz, 714 P.2d 677 (Utah 1986).

Prior to trial in the instant case, the trial court conducted a hearing on co-defendant Carma Hainsworth's Motion for Recusal in the absence of Mr. Gardner and counsel, and the ruling on Mr. Gardner's corresponding motion was entered without a hearing and in his absence. (T. 1118). Mr. Gardner did not waive his right to be

present when this important motion was considered. Additionally, exhibits submitted to support a Motion for Change of Venue were reviewed by the court without Mr. Gardner and counsel. (T. 1205).

The right to presence has special importance in a capital proceeding. See Proffitt v. Wainwright, 685 P.2d 1227 (11th Cir. 1982), modified on reh'g, 706 F.2d 311 (11th Cir. 1983). A violation of this fundamental constitutional right requires reversal unless the State establishes that the error was harmless beyond a reasonable doubt. See State v. Codianna, 573 P.2d 343, 348-49 (Utah 1977); People v. Campbell, 785 P.2d 153 (Colo. App. 1989).

The district court below held that Mr. Gardner's right to be present at all critical stages of the proceeding was "substantially observed." Memorandum Decision, at 11. Additionally, the court held that any error was harmless beyond a reasonable doubt. Mr. Gardner respectfully contends that the district court erred in reaching these conclusions.

VII. THE SENTENCING PROCEEDING WAS UNRELIABLE BECAUSE JURORS WERE ALLOWED TO CONSIDER IMPERMISSIBLE INFORMATION ABOUT THE VICTIM, MICHAEL BURDELL.

In a capital case, the accused's "punishment must be tailored to his personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982). While Mr. Gardner's direct appeal was pending, the United States Supreme Court decided that this principle was violated when the prosecution argued or introduced evidence concerning the victim's personal characteristics, the emotional impact of the killing on the

victim's family and the opinions of family members about the crime and the defendant. South Carolina v. Gathers, 490 U.S. 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989); Booth v. Maryland, 482 U.S. 496 (1987).

However, in 1991, the Court reconsidered the issue and held that the Eighth Amendment does not prohibit a state from allowing victim impact evidence in a capital sentencing hearing. Payne v. Tennessee, 111 S.Ct. 2597 (1991). Notwithstanding this reversal by the Payne court, this Court should apply the reasoning of Booth and Gathers, and hold that the use of victim impact evidence in a capital proceeding is impermissible under the Utah Constitution.

In Mr. Gardner's case, Bob Macri testified that he knew Mr. Burdell very well and that "He had a radio program where he did public service work." (T. 2207). In the trial on the merits, the prosecutor argued in closing that:

> Isn't it unfortunate we hear so little about the victim of the crime? You got to see his picture, but you really didn't get to see Michael Burdell. You didn't get to meet this man, did you? Well, we know that Michael Burdell was a human being with life's pleasures, with life's challenges and with life's opportunities before him, he had a life that contributed and would have contributed. We know he was a lawyer. We know he did pro bono work, and we know just before he was killed he was in that archives room joking and kibitzing with his associates.
>
> I think, above everything else, the most poignant statement made in this whole trial was made by Bob Macri. Remember he said, the reason I was i just a bad state afterwards and falling apart wasn't because I was frightened, no, it was because I felt a tremendous sadness. My friend was now dead. Michael Burdell had a right to live. He had a right to contribute. He had a right to continue to

> joke and kibitz with his friends. He had a right to live.

(T. 2533-34). The prosecutor then reminded jurors that they were representatives of the community. (T. 2534).[13] At the same time, Mr. Gardner was prevented from countering the effect of this improper evidence and argument with testimony that Mr. Burdell's relatives and friends did not want a death sentence to be imposed, and that Mr. Burdell would have opposed such a punishment, (.51). The unacceptable risk that victim impact evidence will produce an arbitrary decision therefore was enhanced in Mr. Gardner's case, because jurors received a distorted picture of the impact of the crime on Mr. Burdell's relatives and friends.

The Utah Constitution has been interpreted by this Court to provide greater protection in capital cases than that required by the federal Bill of Rights. See State v. Wood, 648 P.2d 71 (Utah), cert. denied, 459 U.S. 988 (1982). See also State v. Andrews, No. 920308 and No. 920309 (Utah July 21, 1992)(J. Durham dissenting). Precluding victim impact evidence and argument is compelled by this Court's recognition that death is different, and the need for heightened reliability in capital punishment decisions.

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[13] Although this argument occurred in the trial on the merits rather than the penalty phase, jurors were specifically instructed that they could consider evidence presented during the guilt phase. (T. 613). Additionally, jurors were instructed that they could consider sympathy and sentiment in determining Mr. Gardner's punishment. (T. 617). This instruction was not limited to sympathy for Mr. Gardner associated with mitigating evidence, but could have been read to include sympathy for the victim, Mr. Burdell, and Mr. Macri.

VIII. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT JURORS ON ALL STATUTORY MITIGATING CIRCUMSTANCES.

One of the fundamental principles of capital punishment jurisprudence emphasizes the importance of mitigating evidence. Under the Eighth and Fourteenth Amendments, jurors in a capital sentencing proceeding may "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586 (1976); accord, e.g., Penry v. Lynaugh, 492 U.S. 302 (1989); Mills v. Maryland, 486 U.S. 367 (1988); Eddings v. Oklahoma, 455 U.S. 104 (1982).

Under Utah's capital punishment scheme, "[m]itigating circumstances shall include, [inter alia, the fact that "The defendant acted under extreme duress or under the substantial domination of another person. Utah Code Ann. § 76-3-207(2)(c).

In the instant case, the penalty phase instructions given by the trial court omitted a definition of this subsection (2)(c) mitigating circumstance.[14] The failure to include the subsection (2)(c) mitigating circumstance in jury instructions deprived Mr. Gardner of his right to have jurors consider and give effect to all mitigating evidence presented at trial.

Although the circumstances in this case did not show that

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[14] The circumstances in subsections (a) and (f) also were omitted, but apparently were withdrawn by counsel, according to the trial judge's notation on an instruction tendered by the defense. (T. 535).

another person was coercing Mr. Gardner into his actions at the time of the offense, the jury reasonably could have determined that he was in a state of physical duress, as that term is popularly understood.[15] Mr. Gardner's construction of the (2)(c) mitigating is appropriate in light of the fundamental principle that mitigating circumstances must be broadly interpreted in favor of the defendant. See, e.g., Skipper v. South Carolina, 476 U.S. 1 (1986).

In the proceedings below, the district court agreed with the State that the instructions given at trial allowed jurors to consider Mr. Gardner's physical condition as mitigating evidence. Memorandum Decision, at 30-31. According to the State, during the trial on the merits, Mr. Gardner had presented evidence of his physical condition, and the jury was instructed in the penalty phase that it could consider "any other fact in mitigation of the penalty."

It is true that Mr. Gardner had attempted in the trial on the merits to present the defense that the physical effects of the gunshot wound he received prevented him from forming the mental state necessary for conviction of first degree murder. However, in the penalty phase, jurors were instructed that they were not to consider any residual doubts as to Mr. Gardner's guilt. (T. 612-13). The harm caused by the failure to instruct on subsection (c)

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[15] The word "duress" is synonymous, inter alia, with the words "force" and "stress." See, W. Burton, Legal Thesaurus, P. 191 (1980). Clearly, force or stress could come from a physical source.

was exacerbated rather than alleviated.

Further, the general instruction that jurors could consider any other fact in mitigation was not an effective substitute for a charge in accordance with subsection (2)(c). This general instruction did not provide specific guidance or direction that jurors could consider Mr. Gardner's physical condition during the shooting as a reason to show mercy.

Jurors were unconstitutionally precluded from giving mitigating effect to the fact that Mr. Gardner had been shot in the chest immediately before killing Mr. Burdell. The jury's sentencing decision therefore was constitutionally unreliable. U.S. Const., Am. VIII and XIV; Utah Const., Art. I, §§ 7 and 9.

IX. THE TRIAL COURT ERRED IN REFUSING AN INSTRUCTION THAT WOULD HAVE INFORMED JURORS THAT THE PROSECUTION HAD TO ESTABLISH THE EXISTENCE OF AN AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT.

In the penalty phase of trial, the trial court refused to give the following instruction offered by Mr. Gardner:

> Before you consider any fact as an aggravating circumstance, you must find that that fact has been established by the evidence beyond a reasonable doubt. You may not consider any for choosing to impose the death sentence unless you are satisfied beyond a reasonable doubt (and to a moral certainty) that that fact is true.

(T. 532). This instruction was necessary to adequately channel the jury's discretion and ensure that the punishment decision was reliable. U.S. Const., Am. VIII and XIV; Utah Const., Art. I, §§ 7 and 9.

In Utah, before a death sentence, can be ordered, the

prosecution must prove beyond a reasonable doubt that the totality of evidence of aggravating circumstances outweighs the totality of evidence of mitigating circumstances and that death is the appropriate punishment. State v. Wood, 648 P.2d 71 (Utah), cert. denied, 459 U.S. 988 (1982). In the district court below, the State agreed that the Wood decision implied a need for a finding as to the existence of aggravation.

In requiring jurors to find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances and that death is the appropriate punishment, the Wood opinion exceeds what has been mandated in some other states for the imposition of a death sentence. In creating additional protections, this Court recognized that imposing the death penalty is "the most solemn and final act that the state can take against an individual." 648 P.2d at 80. Because the decision to impose the death penalty laws must occur judiciously and fairly, the guarantees inherent in due process of law must apply to the capital sentencing proceeding. 648 P.2d at 80-81. The requirement of proof beyond a reasonable doubt is a fundamental component of due process. In re Winship, 397 U.S. 358 (1970).

Other jurisdictions have declined to follow Wood because of a belief that "While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt standard, the relative weight is not." Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983) (Citations omitted). Significantly, some jurisdictions not requiring a Wood instruction

on weighing do apply the reasonable doubt standard to the proof or existence of aggravating circumstances. E.g., State v. Simants, 250 N.W.2d 881, 888 (Neb. 1977).

The existence of aggravating circumstances must be established before they can be weighed against mitigating circumstances. The fact finding function in a trial on the merits is analogous to determining the existence of aggravating circumstances, and the standard of proof should be applied. See State v. Wood, 648 P.2d at 84, n.10; see also, Lewis v. Jeffers, 110 S.Ct. 3092 (1990).

Moreover, this Court has stated explicitly that "The State has the burden of proof as to the existence of aggravating factors and must show that they 'outweigh' the mitigating factors." State v. Holland, 777 P.2d 1019, 1025 (Utah 1989) (Emphasis added). Additionally, "A jury must first determine the existence of aggravating factors before it can determine their weight." State v. Parsons, 781 P.2d 1275, 1280 (Utah 1989).

Although the need for the instruction requested by Mr. Gardner flows directly from State v. Wood, the district court declined to grant postconviction relief based on the trial court's refusal to give it. According to the district court, the trial court properly refused the instruction because this was a "previously unarticulated basis for challenging a death sentence in Utah." Memorandum Decision, at 31. The language requested by Mr. Gardner was compelled by the logic and reasoning of Wood, in spite of the fact that no Utah appellate court had required a similar instruction. The district court erred in concluding that the

instruction was not necessary.

X. MR. GARDNER'S RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL, TO DUE PROCESS OF LAW AND TO A FAIR HEARING HAVE BEEN VIOLATED BY THE DISTRICT COURT'S REFUSAL TO APPOINT AN INVESTIGATOR AND EXPERT WITNESSES TO ASSIST MR. GARDNER; THE REFUSAL TO PROVIDE THIS ASSISTANCE IS AN UNCONSTITUTIONAL RESTRAINT ON MR. GARDNER'S ABILITY TO PRESENT HIS CASE.

At all times during the postconviction proceeding below, Mr. Gardner has asserted that he is entitled to the assistance of investigators and expert witnesses to help him present his case. Particularly, Mr. Gardner has argued that this assistance is crucial to his efforts to demonstrate that trial counsel provided ineffective assistance. However, as the district court found, the State vigorously opposed Mr. Gardner's requests and they, therefore, were denied.

Nevertheless, the State argued below and now contends in this Court that Mr. Gardner should not receive a new sentencing hearing or a new appeal because he has not demonstrated the prejudice required by the second prong of the Strickland v. Washington test. The district court recognized the inherent unfairness in the State's argument, and the "Catch-22" Mr. Gardner now faces. Memorandum Decision, at P.24.

A defendant's right to the assistance of a competent mental health expert to assist in his defense is so fundamental and so important that it is guaranteed by the Fourteenth Amendment. Ake v. Oklahoma, 470 U.S. 68, 83 (1985); Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990). Courts have "recognized a particularly critical interrelation between expert psychiatric assistance and

minimally effective assistance of counsel." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). The need for investigative assistance also is clearly established. The district court recognized the necessity of the assistance Mr. Gardner sought, but accepted the State's arguments that Utah statutes precluded providing defense assistance in postconviction. As argued in Mr. Gardner's Motion for Appointment of Investigator and Experts, the court's conclusion was incorrect.

The failure to provide essential assistance here has violated Mr. Gardner's rights to due process, to meaningful access to the courts and to equal protection of the law and has precluded a full and fair hearing on Mr. Gardner's postconviction claims.

CONCLUSION

For the foregoing reasons and authorities, Mr. Gardner respectfully requests this Court to affirm the district court's decision to grant him a new sentencing hearing and new direct appeal. Mr. Gardner requests the Court to reverse the denial of relief on all other grounds.

Respectfully submitted this 22 day of January, 1993.

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CERTIFICATE OF MAILING

I certify that a copy of this Opening Brief was hand delivered to Charlene Barlow, Assistant Attorney General, Office of the Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, on this 22 day of January, 1993.